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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO ADAN,

Defendant and Appellant.

G051551

(Super. Ct. No. 14CF2037)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Sheila F. Hanson, Judge. Affirmed. Request for judicial notice. Granted.

Dennis P. O’Connell for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and  
Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Alberto Adan was convicted of robbery and possession of a controlled substance. The trial court imposed a two-year sentencing enhancement pursuant to Penal Code section 12022.1 because defendant committed the robbery while he was out on bail for a previous crime. Defendant argues the court erred in doing so because, although he had been convicted of the previous crime, he had not yet been sentenced on it when he was sentenced in the current case. Nothing in the statute or case law supports defendant's argument.

Defendant also argues there was insufficient evidence to support his conviction for robbery. On the contrary, there was more than sufficient evidence to support the jury's verdict.

Therefore, we affirm.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 3, 2013, shortly before noon, defendant entered Don Roberto's jewelry store in Santa Ana. Defendant told the sales associate he wanted to purchase an anniversary gift for his wife. The sales associate thought defendant was acting suspiciously, as he denied carrying any identification, claimed he was going to pay cash for the ring, asked if jewelry in another case was more expensive, and put his hand "in the area of the back." Defendant left the store shortly thereafter. When the sales associate went on her lunch break, she saw defendant in front of a neighboring business, appearing to count his money.

At about 1:15 that afternoon, defendant reentered the jewelry store, identified himself as Alberto, and told the store manager he wanted to buy an engagement ring for \$400 cash. Defendant appeared to be nervous, and told the store manager he felt uncomfortable with people looking at him. The manager told defendant he should remove his cap "because that made him look suspicious."

Defendant then pulled out a semiautomatic handgun, pointed it at the manager, and took five rings from the open jewelry case. The manager was afraid that defendant would shoot him.

The sales associate identified defendant from a six-pack photo lineup she was shown six months after the robbery, and also identified defendant as the robber at trial. The store manager was unable to identify defendant from a photo lineup or at the preliminary hearing. At trial, however, he testified he was “90 percent sure” defendant was the person who robbed him.

Both the sales associate and the manager told the police the robber had a tattoo of a word on his neck. The sales associate noticed that he had three dots tattooed on his right hand, and the manager noticed that he had letters tattooed on his right finger. When defendant was arrested, the police took photos showing that he had a neck tattoo reading “Delinkuent,” a finger tattoo reading “DUK,” and a wrist tattoo with three dots.

Defendant was contacted by police investigators in June 2014. When they searched his garage apartment, they found three bindles of methamphetamine, weighing a total of 2.1 grams.

Defendant had been arrested and charged in a separate case, case No. 13CF1910, and was released on bail on that charge when the robbery in the present case was committed. On December 11, 2013, a jury found defendant guilty of all charges in case No. 13CF1910.<sup>1</sup>

Defendant was charged in an information with one count of robbery (Pen. Code, §§ 211, 212.5, subd. (c)), and one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). The information alleged as

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<sup>1</sup> Pursuant to Evidence Code sections 452, subdivision (d), 453, and 459, subdivision (a), we grant the Attorney General’s unopposed request for judicial notice of the minutes from Orange County Superior Court case No. 13CF1910, attached as exhibit A to the Attorney General’s request.

sentencing enhancements that defendant committed the crimes while out on bail from another crime (Pen. Code, § 12022.1, subd. (b)), and that defendant committed the robbery with the personal use of a firearm (*id.*, § 12022.53, subd. (b)). A jury found defendant guilty of both counts, and found true the firearm enhancement allegation. In a bifurcated proceeding, the trial court found true the crime-bail-crime enhancement allegations.

The court sentenced defendant to 14 years in state prison as follows: the low term of two years for robbery; a concurrent term of 30 days for possession of a controlled substance; a consecutive term of two years for the crime-bail-crime enhancement; and a consecutive term of 10 years for the firearm enhancement.

## DISCUSSION

### I.

#### *THE TRIAL COURT PROPERLY IMPOSED THE SENTENCE ENHANCEMENT UNDER PENAL CODE SECTION 12022.1.*

Defendant argues that the trial court erred by imposing a sentence enhancement under Penal Code section 12022.1. Defendant contends that the sentence enhancement could not be imposed until after he had been sentenced in case No. 13CF1910. We disagree.

Penal Code section 12022.1, subdivision (b) requires that a consecutive two-year penalty enhancement be added to a defendant's sentence when the current offense was committed while the defendant was released from custody on a previous offense. The statute ties the imposition of the sentence enhancement to the *conviction* of the previous offense, not its *sentencing*. "Whenever there is a conviction for the secondary offense and the enhancement is proved, and the person is sentenced on the secondary offense prior to the conviction of the primary offense, the imposition of the enhancement shall be stayed pending imposition of the sentence for the primary offense.

The stay shall be lifted by the court hearing the primary offense at the time of sentencing for that offense and shall be recorded in the abstract of judgment. If the person is acquitted of the primary offense the stay shall be permanent.” (Pen. Code, § 12022.1, subd. (d).)

The language of Penal Code section 12022.1 is consistent with the general use of “conviction” to mean a verdict or guilty plea for purposes of sentencing enhancements. (See *People v. Franklin* (1997) 57 Cal.App.4th 68, 72-73 [“conviction” for purposes of “Three Strikes” law sentencing]; *People v. Shirley* (1993) 18 Cal.App.4th 40, 46-47 [“conviction” does not mean final judgment for purposes of Penal Code section 667].)

Defendant relies on *People v. Meloney* (2003) 30 Cal.4th 1145 (*Meloney*). That case, however, is inapposite. In that case, the defendant was charged with crimes in Santa Clara County. (*Id.* at p. 1151.) While out on bail for those offenses, he committed other crimes in Marin County. (*Ibid.*) The defendant was convicted of the Marin County charges and sentenced. (*Id.* at pp. 1151-1152.) The Marin County court stayed imposition of the two-year, crime-bail-crime enhancement because the defendant was being sentenced before he had been convicted of the Santa Clara County crimes. (*Id.* at p. 1152.) When the defendant later pleaded guilty in Santa Clara County, the sentencing court did not lift the Penal Code section 12022.1, subdivision (d) stay. (*Meloney, supra*, at pp. 1152-1153.)

The California Supreme Court’s holding was three-fold: “First, we conclude that when, as here, the secondary felony offense is adjudicated first and an on-bail enhancement is proved, the secondary-offense court may proceed in one of two ways: (1) The secondary-offense court may—following the express terms of [Penal Code] section 12022.1, subdivision (d)—stay ‘imposition of the enhancement.’ If the court follows that course, the enhancement is not imposed as a part of the defendant’s sentence but is preserved until after the primary-offense court has rendered judgment on a

felony conviction in that court, at which time the secondary-offense court, exercising its discretion, may either impose the enhancement or strike it pursuant to [Penal Code] section 1385. (2) Alternatively, the secondary-offense court may immediately consider whether to strike the enhancement under section 1385 or to impose the enhancement as part of the defendant's sentence. If the court concludes it is appropriate to exercise discretion to strike the enhancement, it may do so. If the court determines to impose the enhancement, it may do so, but it also must stay execution of that aspect of the sentence, pending resolution of the prosecution of the primary offense. If the court imposes the enhancement and stays its execution, that aspect of the imposed sentence becomes effective immediately upon the primary-offense court's order lifting the stay after the defendant has been convicted of the primary felony offense. [¶] Second, we conclude that the primary-offense court lacks discretion under section 1385 to strike an enhancement that was pleaded and proved, and whose imposition was stayed in the secondary-offense court. Whether the secondary-offense court has issued a stay of imposition of the enhancement, or imposed the enhancement as a part of the defendant's sentence but stayed execution of that aspect of the sentence, the primary-offense court, upon the defendant's felony conviction on the primary offense, has the authority only to lift the stay—and, indeed, it must lift the stay. Upon the primary-offense court's lifting a stay of imposition of the enhancement, the defendant must be returned to the secondary-offense court, at which time that court must exercise its discretion under section 1385 and decide whether to strike the enhancement or impose sentence on the enhancement. Upon the primary-offense court's lifting of the stay of the execution of a previously imposed enhancement of the defendant's sentence, that enhanced sentence becomes effective immediately. [¶] Third, with respect to an issue that arose in this case but should not often occur, we conclude that when the primary-offense court inadvertently fails to lift a stay following the defendant's conviction of the primary offense, that failure may be remedied either by a motion in the primary-offense court, by a motion in the

secondary-offense court (which can take judicial notice of the conviction on the primary felony offense), or by a writ petition in the Court of Appeal. In the present case, we conclude that the Marin County Superior Court properly could take judicial notice of defendant's conviction of the primary offense in the Santa Clara County Superior Court and could lift its own previously imposed stay on the basis of that conviction, and then could proceed to determine whether to strike or to impose the on-bail enhancement as a part of the defendant's sentence." (*Meloney, supra*, 30 Cal.4th at pp. 1149-1150.)

*Meloney, supra*, 30 Cal.4th 1145, does not address the factual situation presented here. In *Meloney*, the defendant was sentenced on the second set of offenses before he had been convicted of the first set of offenses. In this case, by contrast, defendant was convicted of the first offense long before he was convicted of, much less sentenced on, the second set of offenses. Nothing in *Meloney* addresses, much less compels reversal of, the sentence defendant received in the present case.

## II.

### *THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE ROBBERY CONVICTION.*

Defendant contends there was insufficient evidence to support his conviction for robbery. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

In this case, a surveillance video was played for the jury showing the sales associate and the store manager waiting on the same individual, about 30 minutes apart, and showing that individual pull a gun on the manager and take items from the jewelry case. Both the sales associate and the store manager identified defendant as the robber at trial, as discussed more particularly, *ante*. The sales associate also positively identified defendant as the robber in a photo lineup and at the preliminary hearing. Both of these individuals also identified defendant's tattoos, and described his physical features to the investigating police. The sales associate testified that defendant acted suspiciously, and that she saw him outside a neighboring store counting money.

Defendant focuses on the store manager's inability to identify defendant in a photo lineup or at the preliminary hearing, and discrepancies in the sales associate's description of defendant's tattoos. These are issues of witness credibility which are reserved to the trier of fact. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.) We conclude substantial evidence supported the jury's verdict.

#### DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.